MOHD NOOR ABDULLAH

v.

NORDIN HJ ZAKARIA & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
HAIDAR MOHD NOOR JCA
ABDUL HAMID MOHAMAD JCA
[CIVIL APPEAL NO: W-01-85-1999]
24 MARCH 2001

ADMINISTRATIVE LAW: *Exercise of administrative powers - Domestic discipline - Procedural fairness - Legitimate expectation - Appellant not informed that charges of misconduct against him could lead to dismissal if convicted - Whether dismissal void - Public Officers (Conduct & Discipline) Regulations 1993, reg. 28(1) - Whether applicable to junior police officers - Federal Constitution, arts. 5(1), 8(1), 135(2)*

ADMINISTRATIVE LAW: *Public servants - Dismissal of subordinate police officers - Procedural fairness - Legitimate expectation - Appellant not informed that charges of misconduct against him could lead to dismissal if convicted - Whether dismissal void - Public Officers (Conduct & Discipline) Regulations 1993, reg. 28(1) - Whether applicable to junior police officers - Federal Constitution, arts. 5(1), 8(1), 135(2)*

ADMINISTRATIVE LAW: *Rules of natural justice - Procedural fairness - Legitimate expectation - Appellant not informed that charges of misconduct against him could lead to dismissal if convicted - Whether dismissal void - Public Officers (Conduct & Discipline) Regulations 1993, reg. 28(1) - Whether applicable to junior police officers - Federal Constitution, arts. 5(1), 8(1), 135(2)*

CONSTITUTIONAL LAW: *Public servants - Dismissal - Procedural fairness - Legitimate expectation - Appellant not informed that charges of misconduct against him could lead to dismissal if convicted - Whether dismissal void - Public Officers (Conduct & Discipline) Regulations 1993, reg. 28(1) - Whether applicable to junior police officers - Federal Constitution, arts. 5(1), 8(1), 135(2)*

PUBLIC SERVANTS: *Dismissal - Dismissal of subordinate police officer - Procedural fairness - Legitimate expectation - Appellant not informed that charges of misconduct against him could lead to dismissal if convicted - Whether dismissal void - Public Officers (Conduct & Discipline) Regulations 1993, reg. 28(1) - Whether applicable to junior police officers - Federal Constitution, arts. 5(1), 8(1), 135(2)*

The appellant, a lance corporal in the police force, was dismissed due to misconduct. He appealed contending that his dismissal was unjust as it was not done in accordance with fair procedure.

The respondents, at the time they charged the appellant, did not inform him that he might be dismissed from the service. Under the Police (Conduct & Discipline) (Junior Police Officers & Constables) Regulations 1970 ('the 1970 Regulations'), there is no express provision requiring a junior police officer, such as the appellant, to be so informed. However, reg. 28(1) of the Public Officers (Conduct & Discipline) Regulations 1993 ('the 1993 Regulations') does contain such a requirement, but it is only applicable to senior officers. Previously, the Public Officers (Conduct & Discipline) (Chapter 'D') General Orders 1980 ('the General Orders') had governed the discipline of senior police officers before it was repealed by the 1993 Regulations. Addendum A 207 in the Inspector General's Standing Orders provided that where certain provisions under the General Orders were not expressly provided for under the 1970 Regulations, such provisions under the General Orders would be applicable to junior police officers.

The appellant argued that reg. 28(1) of the 1993 Regulations should be extended to junior police officers, following the decision in *Ekambaram v. Ketua Polis Daerah Melaka Tengah*, and also because of the general requirement of procedural fairness, which is the joint product of art. 135(2) read with arts. 5(1) and 8(1) of the Federal Constitution. The High Court rejected the appellant's argument and hence the instant appeal.

Held:

Per Gopal Sri Ram JCA

[1] By its terms, reg. 28(1) of the 1993 Regulations accords with procedural fairness and there is a legitimate expectation vested in junior police officers that it is extended to them. Any other interpretation would offend the joint operation of arts. 5(1), 8(1) and 135(2) of the Federal Constitution and there would be an unfair deprivation of procedural fairness.

[2] The fact that the plaintiff in *Ekambaran v. Ketua Polis Daerah Melaka Tengah* pleaded guilty whereas in this case the appellant claimed trial, was not a distinguishing factor of any significance upon the question whether procedural fairness was meted out.

[3] Section 35(2) of the Interpretation Acts of 1948 & 1967 states that where any written law is repealed and re-enacted, references in any other written laws to the law so repealed shall be construed as references to the re-enacted law. Following this section, any reference to the General Orders

in Addendum A 207 must now refer to the 1993 Regulations, which means that reg. 28(1) of the 1993 Regulations will apply to junior police officers.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu, seorang lans koperal dalam pasukan polis, telah dipecat atas suatu salah laku kerja. Beliau merayu bahawa pemecatan beliau adalah tidak sah kerana ia dibuat tanpa mengikut prosedur yang adil.

Responden-responden, pada waktu mereka menuduh perayu, tidak memaklumkan beliau bahawa beliau mungkin akan diberhentikan daripada perkhidmatan. Di bawah Peraturan-Peraturan Polis (Kelakuan & Tatatertib) (Konstabel & Pegawai Polis Rendah) 1970 ('Peraturan-Peraturan 1970'), tidak terdapat peruntukan nyata yang menghendaki seorang pegawai polis rendah, seperti perayu dimaklumkan. Walaubagaimanapun, Peraturan 28(1) Peraturan-Peraturan Pegawai Awam (Kelakuan & Tatatertib) 1993 ('Peraturan-Peraturan 1993') sesungguhnya mempunyai syarat yang sedemikian, tetapi ianya hanya terpakai kepada pegawai-pegawai kanan. Peraturan-Peraturan Am Pegawai-Pegawai Awam (Kelakuan & Tatatertib) (Bab 'D') 1980 ('Bab D') menguasai tatatertib pegawai-pegawai kanan polis sebelum ianya dimansuhkan oleh Peraturan-Peraturan 1993. Adendum A 207 dalam Arahan-Arahan Tetap Ketua Inspektor memperuntukkan bahawa di mana peruntukan-peruntukan tertentu di bawah Bab D tidak diperuntukkan dengan nyata di bawah Peraturan-Peraturan 1970, peruntukan-peruntukan yang sedemikian di bawah Bab D akan menjadi terpakai kepada pegawai-pegawai rendah polis.

Perayu berhujah bahawa Peraturan 28(1) Peraturan-Peraturan 1993 seharusnya dilanjutkan kepada pegawai-pegawai rendah polis, berikutan keputusan *Ekambaram lwn. Ketua Polis Daerah Melaka Tengah*, dan juga kerana syarat am prosedur keadilan yang mana merupakan hasil bersesama art. 135(2) yang dibaca bersama art. 5(1) dan 8(1) Perlembagaan Persekutuan. Mahkamah Tinggi menolak hujahan perayu dan oleh itu rayuan ini dikemukakan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Menurut terma-termanya, Peraturan 28(1) Peraturan-Peraturan 1993 berhubung dengan keadilan prosedur, dan terdapat harapan sah yang terletak pada pegawai-pegawai rendah polis yang ianya akan dilanjutkan kepada mereka. Apa-apa kesimpulan lain akan mengganggui operasi bersesama art. 5(1), 8(1) dan 135(2) Perlembagaan Persekutuan dan akan berlaku perlucutan hak yang tidak adil bagi keadilan prosedur.

[2] Hakikat bahawa plaintif dalam *Ekambaram lwn. Ketua Polis Daerah Melaka Tengah* telah mengaku bersalah sedangkan dalam kes ini perayu telah menuntut perbicaraan, bukannya merupakan faktor perbezaan yang ketara mengenai isu samada keadilan prosedur telah dilaksanakan.

[3] Seksyen 35(2) Akta-Akta Interpretasi 1948 & 1967 menyatakan bahawa di mana undang-undang bertulis telah dimansuhkan dan digubalkan semula, rujukan dalam mana-mana undang-undang lain kepada undang-undang atau peruntukan yang telah dimansuhkan sedemikian, akan ditafsirkan sebagai rujukan-rujukan kepada undang-undang yang digubal semula atau pun peruntukan itu. Berikutan seksyen ini, sebarang rujukan kepada Bab D dalam Adendum A 207 mestilah kini dirujuk kepada Peraturan-Peraturan 1993, yang mana bermakna bahawa Peraturan 28(1) Peraturan-Peraturan 1993 akan terpakai kepada pegawai-pegawai rendah polis.

[Rayuan dibenarkan.]

Case(s) referred to:

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***
Ekambaram v. Ketua Polis Daerah Melaka Tengah [1997] 2 MLJ 454 ***(refd)***
Inspector General of Police v. Alan Noor Kamat [1988] 1 MLJ 260 ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor [1999] 3 CLJ 65 ***(refd)***
R v. Brent LBC ex p Gunning [1985] 84 LGR 168 ***(refd)***
R v. British Coal Corporation ex p Vardy [1993] ICR 720 ***(refd)***
Selvaras v. Aziz Ariarasa Abdullah & Anor (Civil Suit No: S1-21-170-98) (unreported) ***(refd)***

Legislation referred to:

Federal Constitution, arts. 5(1), 8(1), 135(2)
Inspector General's Standing Orders, Addendum A 207
Interpretation Acts 1948 & 1967, s. 35(2)
Police (Conduct & Discipline) (Junior Police Officers & Constables) Regulations 1970
Public Officers (Conduct & Discipline) (Chapter 'D') General Orders 1980, GO 26
Public Officers (Conduct & Discipline) Regulations 1993, reg. 28(1)

For the appellant - Karpal Singh (Gobind Singh Deo & Ram Karpal Singh with him); M/s Karpal Singh & Co
For the respondents - Ahmad Kamal Md Shahid SFC

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-21-166-1997]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

Of late, in a number of varying fact patterns, we have been asked to say whether a citizen has received procedural fairness. This is yet another of such cases.

The facts of this case have been dealt with in detail in the judgment appealed against. I will therefore not rehearse them here. A summary of such facts as are essential to the disposal of this appeal will suffice.

The appellant was a Lance Corporal in the Police Force. He faced four charges of misconduct. He was found guilty and convicted on three of those charges. He was dismissed from the Force. He brought an action for a declaration that his dismissal was void because he did not get a fair procedure. To fully appreciate the arguments of counsel, it is necessary to have regard to some of the legislation that is applicable to a case as the present.

The appellant's case comes under the Police (Conduct & Discipline) (Junior Police Officers & Constables) Regulations 1970 ("the 1970 Regulations"). The respondents did not, at the time they served the charges on the appellant, inform him that he might be dismissed from service. It is true that the Regulations do not contain any express provision requiring the respondents to so inform a junior police officer, such as the appellant. But, reg. 28(1) of the Public Officers (Conduct & Discipline) Regulations 1993 ("the 1993 Regulations") does contain such a requirement.

Now, this is what reg. 28(1) says:

> 28 (1) The appropriate Disciplinary Authority sitting to consider a case where the breach of discipline complained of has been found to be of a nature which merits a punishment of dismissal or reduction in rank shall consider all the available information and where it appears that there is a *prima facie* case against the officer for dismissal or reduction in rank, the appropriate Disciplinary Authority shall direct that a statement containing the facts of the breach if discipline alleged to have been committed by the officer and any proposed ground on which the officer is to be dismissed or reduced in rank be sent to the officer and shall call upon him to make a written representation, containing grounds upon which he relies to exculpate himself, within a period of not less than twenty-one days from the date of receipt of the charge.

This regulation finds its origins in The Public Officers (Conduct & Discipline) (Chapter 'D') General Orders 1980 ("Cap. D"). Its effect is not in doubt. The regulation requires that there should be a show cause letter that:

> must bring to the attention of the civil servant concerned of the contemplated punishments to make him appreciate the gravity of the situation and thus enable him to give a satisfactory explanation as best as he could. (per Salleh Abas LP in *Inspector General of Police v. Alan Noor bin Kamat* [1988] 1 MLJ 260, at p. 261.)

The 1993 Regulations (which repealed and replaced Cap. D) do not apply to junior police officers. They only apply to senior police officers, such as Police Inspectors. Before the 1993 Regulations came into force, the discipline of senior police officers was governed by Cap D. But an Addendum A 207 in the Inspector General's Standing Orders provided as follows:

> However, where certain provision under General Orders Cap 'D' are not expressly provided for under the Police Regulations 1970, such provisions under General Orders Cap 'D' shall be applicable to Junior Police Officers and Constables.

The appellant argues that the beneficial provisions in the 1993 Regulations, in particular, reg. 28(1), should be extended to junior police officers as well. He founds this argument on two sources. First, from the decision in *Ekambaram v. Ketua Polis Daerah Melaka Tengah* [1997] 2 MLJ 454. Second, from the general requirement of procedural fairness which, for the purposes of the present case, is the joint product of art. 135(2) read with arts. 5(1) and 8(1) of the Federal Constitution.

Ekambaram v. Ketua Polis Daerah Melaka Tengah (ibid) concerned the case of a junior police officer who was dismissed from service after he pleaded guilty to a charge of wilfully disobeying a lawful order. Suriyadi J, in striking down the order of dismissal held that Addendum A 207 had the effect of extending the requirement in reg. 28 of the 1993 Regulations to junior police officers. After setting out the addendum, he proceeded as follows:

> In this context, the General Orders Cap 'D' is to be read as Bab D 1993 as this law had replaced the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980. By the construction of the above addendum, it will mean that as the procedure and safeguard similar to reg 28 of Bab D 1993 is not made available to a subject in PU (A) 86/70, then the contents of reg 28 will be applicable for the added benefit of the junior officers and constables. For purposes of our case, as it was contemplated that he would be dismissed, and was indeed dismissed, the applicant, pursuant to PU(A) 86/70 and reg 28 Bab D 1993, therefore, should have been informed of that contemplation.
>
> By not informing him of the possible dismissal, the tribunal was in breach of the *audi alteram partem* rule (see *B Surinder Singh Kanda v. The Government of Federation of Malaya* [1962] MLJ 169; *De Souza Lionel Jerome v. A-G* [1993] 1 SLR 882). Perhaps due to the lackadaisical attitude of the disciplinary

board regarding the whole proceeding, the applicant did not take the matter too seriously and hence pleaded guilty. It must have shaken his whole moral fibre when he was informed of that sentence. It would not be unreasonable to remark that had he known of the outcome if found guilty, his approach and attitude to the whole proceeding would not have been that cavalier. He would have come better prepared, and probably afford a better explanation. Certainly, he would not have pleaded guilty.

In *Selvaras v. Aziz Ariarasa Abdullah & Anor.* (Civil Suit No. S1-21-170-98, unreported), Mohd. Saari Yusoff J, refused to follow the decision in *Ekambaram*'s case on the ground that the 1970 Regulations form a complete code with no room for the incorporation of reg. 28. An appeal in *Selvaras*' case is presently pending before this court.

Ekambaram's case was cited to the trial judge in the present instant case. But the learned trial judge declined to follow it. Instead, he purported to distinguish it on the rather narrow ground that the plaintiff in *Ekambaram (supra)* had pleaded guilty while in the instant appellant had claimed trial to the charge against him.

The present appeal is therefore, in reality, a test as to the correctness of the decision in *Ekambaram*'s case. But the global issue for resolution in the present instance is, as I observed at the outset, whether the appellant received procedural fairness in all the circumstances of the case.

Now, I have read and re-read the relevant passages in *Ekambaram*'s case with a view to appreciating the approach adopted by Suriyadi J. But I am, with respect, unable to agree with the interpretative process by which that learned judge came to his conclusion. For, it is plain upon any view of statutory construction that Addendum A 207 does not and cannot be read as referring to the 1993 Regulations. The Addendum in question applied to extend reg. 28 to the 1970 Regulations only for so long as Cap. D was in force. Once Cap. D was replaced by the 1993 Regulations, Addendum 207 abated. It ceased to have any effect. There was simply nothing on which the Addendum could bite. By no stretch of the imagination; or indeed of the English language; could it be argued that the words "General Orders Cap 'D'" in the Addendum are to be read as referring to the 1993 Regulations. Neither is there anything in the language of the 1993 Regulations by way of a saving provision clearly pointing to an intention to keep alive the extension of reg. 28 to the 1970 Regulations. I have therefore regretfully come to the conclusion that the reasoning adopted by Suriyadi J, in *Ekambaram*'s case is wrong.

But by no means am I therefore to be understood as saying that the result in *Ekambaram*'s case was wrong. On the other hand, I am firmly of the view that the actual decision in that case was right. And I will, in a moment, give my reasons for so saying.

It is beyond argument that by its terms reg. 28 accords with procedural fairness. In truth, the non-compliance with its mandatory requirements will result in a dismissal being declared invalid. See, *Inspector General of Police v. Alan Noor bin Kamat (supra).* It is in undoubted recognition of its beneficial effects that Addendum 207 extended it to junior police officers.

Put another way, the intention of the relevant authority was to ensure that the same extent of procedural fairness that was available to senior police officers was made available to junior police officers. There was, therefore, at all material times, a legitimate expectation vested in junior police officers (including the present appellant) that the beneficial provisions of the former equipollent of reg. 28(1) would continue to be extended to them. In my judgment, the decisions in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, *R v. Brent LBC ex parte Gunning* [1985] 84 LGR 168 and *R v. British Coal Corporation ex parte Vardy* [1993] ICR 720, all exemplify the application of the doctrine of legitimate expectation at English common law. They support the proposition that once a particular practice has been adopted, discontinuance of it without prior consultation with those adversely affected by such discontinuance fatally flaws a determination arrived at in consequence thereof.

Now, England (until the recent introduction of the Human Rights Act 1998) had nothing even remotely equivalent to a charter on human rights. By contradistinction, we have, in our Federal Constitution, guaranteed liberties that, when appreciated in their proper concept, are the essence of human rights enjoyable at the instance of our citizens. The English requirement of legitimate expectation is therefore one of the constituents of the doctrine of procedural fairness which, so far as concerns members of the civil service, is to be found in the joint operation of arts. 5(1), 8(1) and 135(2) of the Federal Constitution. It follows that a decision, which in England will be quashed as offending the principle of legitimate expectation, will in our jurisdiction be set aside under the much broader doctrine of procedural fairness. I may here add that the doctrine of legitimate expectation has the effect of conferring both substantive rights as well. See, *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 CLJ 65.

Thus, disapplying reg. 28 on the ground that Addendum 207 has ceased to be of relevance with the coming into force of the 1993 Regulations would deprive junior police officers of an important facet of procedural fairness that had previously been enjoyed by them. Procedural fairness would continue to be ensured only if the procedure prescribed by reg. 28 is continued to be made available to all junior police officers. Any other conclusion would offend the joint operation of arts. 5(1), 8(1) and 135(2) and there would be an unfair

deprivation of procedural fairness. Accordingly, Suriyadi J, was entirely correct in holding that the plaintiff in *Ekambaram*'s case was entitled to receive a notification as prescribed by reg. 28.

Turning to *Selvaras'* case *(supra)*, the less I say about it the better. It is, as I have already pointed out, under appeal. Suffice to say that once *Ekambaram* is accepted as having been correctly decided, the logical conclusion is that *Selvaras*' case is wrong because it cannot stand alongside *Ekambaram*.

That brings me to the present appeal which in my view is governed by *Ekambaram*'s case. The fact that the plaintiff in *Ekambaram* pleaded guilty whereas the instant appellant claimed trial is not a distinguishing factor of any significance upon the issue as to whether procedural fairness was meted out. The attempt by the judge in the court below to draw such a distinction was, with respect, an exercise in futility. What comes across is that the letter to the appellant in the present instance did not bring to his attention the contemplated punishments to make him appreciate the gravity of the situation and thus enable him to give a satisfactory explanation as best as he could. That in itself amounts to a deprivation of procedural fairness.

Since writing this judgment in draft, I have had the benefit of reading the comments on it by my learned brother Abdul Hamid Mohamed, JCA. I agree with him that there is another and better reason for holding for the appellant in this case. The answer lies in the historical antecedent to the written law governing discipline. The oldest of these are the 1970 Regulations. Cap. D was introduced in 1980 with General Order 26 therein. On 15 November 1993, 1980 Cap. D was repealed and superseded by the 1993 Cap. D. The provision of General Order 26 in the new Cap. D is similar to the provision of General Order 26 in the 1980 Cap. D. (One month later, the Police Officers (Conduct and Discipline) Regulations 1993 was introduced. Regulation 28 therein is similar to the provision of General Order 26. But, the 1993 Regulations are not relevant to the proceeding in this case since the 1993 Regulations apply to 'senior police officers' and the appellant is a 'junior police officer'). The question is whether the reference to the 1980 Cap. D in Addendum 207 should be read as referring to the 1993 Cap. D. Now, that triggers s. 35(2) of the Consolidated Interpretation Acts of 1948 & 1967. That section provides as follows:

> (2) Where any written law or any provision of a written law is repealed and re-enacted (with or without modification), references in any other written law to the law or provision so repealed shall be construed as references to the re-enacted law or provision.

It follows as a matter of interpretative deduction that any reference to Cap. D in Addendum 207 must now refer to the later 1993 Cap. D.

For the reasons already given, this appeal succeeds. The decision of the court below is set aside. There shall be a declaration to the effect that the appellant's dismissal is null and void and of no effect. All other ancillary relief prayed for in the foot of the writ is granted. The respondents must pay the costs of this appeal and of the proceedings in the court below.

My learned brothers Haidar Mohd. Noor and Abdul Hamid Mohamad, JJCA have seen this judgment in draft and have expressed their concurrence with the reasons herein.